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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 JOSEPH LEWIS,
8 Plaintiff,
9 v.
10 DELTA AIR LINES, INC.,
11 Defendant.

Case No. 2:14-cv-01683-RFB-GWF

ORDER

Damages & Attorney Fees

12 **I. INTRODUCTION**

13 Before the Court is Plaintiff's Motion for Damages and Recovery (ECF No. 184) and
14 Defendant's Motion to Allow Consideration of Aviation Institute Maintenance Records in Post-
15 Trial Briefing (ECF No. 174). For the reasons discussed below, the Motion for Damages and
16 Recovery is granted in part and denied in part and the Motion to Allow Consideration of Aviation
17 Institute Maintenance Records in Post-Trial Briefing is denied.

18
19 **II. PROCEDURAL BACKGROUND**

20 Plaintiff Joseph Lewis filed a Complaint against Delta Airlines on October 14, 2014. ECF
21 No. 1. Plaintiff brought three claims against Delta: a claim for Failure to Accommodate, under the
22 Americans with Disabilities Act ("ADA"); a claim for Wrongful Termination on the Basis of
23 Disability, under the ADA; and a claim for Unlawful Discriminatory Employment Practices, under
24 NRS 613.31, the Nevada Equal Employment Opportunity Act. On September 22, 2016, the Court
25 denied summary judgment as to Plaintiff's accommodation claims related to his two absences,
26 under the ADA and NRS 613.31, and as to his wrongful termination claims. ECF No. 91. The
27 Court presided over a jury trial on these claims during the week of October 16, 2017. At the
28 conclusion of trial, the jury found for the Plaintiff on both claims and awarded him \$480,000 in

1 compensatory damages and \$800,000 in punitive damages. ECF No. 169. On October 23, 2017,
2 the Court held a hearing on the issue of damages, at which Plaintiff and his expert witness testified.
3 ECF No. 175. On October 30, 2017, Defendant filed a Motion to Allow Consideration of Aviation
4 Institute Maintenance Records in Post-Trial Briefing. ECF No. 174. On December 18, 2017,
5 Plaintiff filed a Motion for Damages and Recovery. ECF No. 184.

6 7 **III. FINDINGS OF FACT**

8 When calculating equitable damages, the Court must make sufficient findings of fact that
9 satisfy the requirements of Fed. R. Civ. P. 52(a). Amantea-Cabrera v. Potter, 279 F.3d 746, 750
10 (9th Cir. 2002). Rule 52(a)(1) requires the Court to “find the facts specially and state its
11 conclusions of law separately.” Id. The court must state findings sufficient to indicate the factual
12 basis for its ultimate conclusion. Kelley v. Everglades Drainage District, 319 U.S. 415, 422 (1943).
13 The findings must be “explicit enough to give the appellate court a clear understanding of the basis
14 of the trial court’s decision, and to enable it to determine the ground on which the trial court
15 reached its decision.” United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir.
16 1983), cert. denied, 464 U.S. 863 (1983) (citations omitted). Accordingly, having reviewed the
17 evidence and observed the witnesses related to the issue of damages, the Court makes the following
18 findings of fact in this case.

- 19 1. Joseph Lewis (“Lewis”) started working for Delta Airlines (“Delta”) as an Aircraft
20 Maintenance Technician in 2000. He transferred to Las Vegas in 2008.
- 21 2. Lewis was suspended without pay on August 29, 2012.
- 22 3. Lewis was terminated from Delta on September 14, 2012.
- 23 4. Delta intentionally wrongfully terminated Lewis based on his disability, HIV.
- 24 5. Lewis filed a claim with the EEOC on February 22, 2013.
- 25 6. Lewis’ base salary was approximately \$78,000 per year when he was terminated from
26 Delta. Lewis occasionally earned overtime hours at Delta. Delta also provided Lewis with
27 health insurance and other fringe benefits.
- 28 7. After Lewis’ employment with Delta was terminated, he exercised reasonable diligence in

1 attempting to find substantially equivalent employment, including applying broadly to jobs
2 in the aviation field, and accepting employment for periods of time at Aviation Institute of
3 Maintenance, Allegiant Airlines, and Gulfstream Aerospace in positions that were inferior
4 in pay and responsibilities to his previous position at Delta.

5 8. On or about March 1, 2016, Lewis commenced employment with Federal Express
6 Corporation ("FedEx"). Lewis' position at FedEx is substantially equivalent to his previous
7 position at Delta.

8 9. Lewis' starting salary at FedEx was \$98,028.00 per year. FedEx does not pay Lewis
9 overtime. FedEx does provide Lewis with health insurance and other fringe benefits.

10 10. Had Delta not terminated Lewis, Lewis would have earned approximately \$734,385 in
11 wages and benefits between his last day of work on August 29, 2012 and the date of this
12 Order.

13 11. Instead, Lewis earned approximately \$373,582 in wages and benefits between August 29,
14 2012 and the date of this Order.

15 12. Between Lewis' last day of work at Delta on August 29, 2012 and the date of this Order,
16 Lewis lost approximately \$360,803 in wages and benefits.

17 13. Had Delta not terminated Lewis, Lewis would have received approximately \$80,593 in
18 bonuses between August 29, 2012 and the date of this Order. Lewis did not earn any
19 bonuses during that time period.

20 14. Lewis' wages and benefits at FedEx will exceed the wages and benefits he would have
21 earned at Delta in approximately 2025. From the date of this Order until that time, Lewis
22 will lose approximately \$50,607 in wages and benefits.

23 15. It would be inappropriate and unfeasible for Delta to reinstate Lewis to his previous
24 position at this point in time. Due to the circumstances of his termination, the time that has
25 passed since he was terminated, and the need to pursue litigation in order to be compensated
26 for his losses, the relationship between Lewis and Delta has significantly deteriorated to
27 the point that it would be virtually impossible for the parties to establish a professional
28 working relationship again in the future.

1 **IV. CONCLUSIONS OF LAW**

2 **A. Compensatory and Punitive Damages**

3 *i. Legal Standard*

4 Under the ADA, the sum of the compensatory and punitive damages awarded can be no
5 greater than \$300,000 against an employer with over 500 employees. 42 U.S.C. § 1981a(b)(3).

6 *ii. Discussion*

7 The jury awarded \$480,000 in compensatory and \$800,000 in punitive damages against
8 Delta. The parties agree that the statutory cap should apply, and the award of compensatory and
9 punitive damages shall be limited to \$300,000.

10

11 **B. Back Pay**

12 *i. Legal Standard*

13 The ADA expressly incorporates the remedies available under Title VII of the Civil Rights
14 Act of 1964, including 42 U.S.C. § 2000e-5. 42 U.S.C § 12117(a). Pursuant to this section, “[i]f
15 the court finds that the respondent has intentionally engaged in or is intentionally engaging in an
16 unlawful employment practice charged in the complaint,” the court may order any equitable relief
17 appropriate, including back pay. 42 U.S.C. § 2000e-5(g)(1). Back pay is an equitable remedy to
18 be determined by the district court in its discretion, rather than by a jury. Lutz v. Glendale Union
19 High Sch., Dist. No. 205, 403 F.3d 1061, 1069 (9th Cir. 2005). There are some limitations on the
20 Court’s discretion, however. “Back pay liability shall not accrue from a date more than two years
21 prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with
22 reasonable diligence by the person or persons discriminated against shall operate to reduce the
23 back pay otherwise allowable.” 42 U.S.C. § 2000e-5(g)(1). Absent compelling circumstances, the
24 award of back pay should be calculated from the date of the discriminatory act to the date of final
25 judgment. Thorne v. El Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986).

26 Plaintiff has a duty to mitigate his damages and the Court should not award back pay for
27 periods when Plaintiff did not exercise reasonable diligence to find substantially equivalent
28 employment. Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995). However, the

1 burden is on the employer to prove that the plaintiff failed to mitigate. Id. To satisfy this burden,
2 the employer must prove that during the time in question there were substantially equivalent jobs
3 available, which the plaintiff could have obtained, and that the plaintiff failed to use reasonable
4 diligence in seeking and maintaining one. Id.

5 Additionally, post-judgment interest must be granted in cases awarding back pay at the rate
6 established in 28 U.S.C. § 1961. Van Asdale v. Int'l Game Tech., 763 F.3d 1089, 1092 (9th Cir.
7 2014). The Ninth Circuit recently held that courts in Title VII cases may also award tax “gross-
8 ups” to counteract any negative tax impacts that result from receiving damages as a lump sum,
9 rather than gradually over time, and ensure that the plaintiff is fully made whole. Clemens v.
10 CenturyLink Inc., 874 F.3d 1113, 1116 (9th Cir. 2017).

11 *ii. Discussion*

12 The Court finds that Plaintiff is entitled to a back pay award including lost wages and
13 benefits that he would have earned between his last day of work at Delta and the date of this Order,
14 at which point final judgment in this case shall be entered. The Court also finds that Plaintiff is
15 entitled to lost bonuses that he would have received had he remained employed at Delta during
16 this period. In making these determinations, the Court has reviewed the evidence and finds that
17 Plaintiff and his expert, Dr. Thomas Carroll, provided credible arguments and reliable evidence
18 including payroll information, publicly available information regarding Delta’s pay raise and
19 bonus policies, and reasonably reliable statistical information to make approximations of
20 Plaintiff’s lost wages, benefits, and bonuses during this period. Further, Defendant has not met its
21 burden of proving that Plaintiff failed to mitigate his damages.¹ Instead, the Court finds that
22 Plaintiff exercised reasonable diligence to mitigate his damages by applying broadly to positions
23 in the aviation field, accepting multiple positions that were inferior in wages and responsibilities
24 to his previous position at Delta, and obtaining substantially equivalent employment at FedEx prior
25 to the commencement of trial in this case. The Court will subtract the amount that Plaintiff earned

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27 ¹ The Court will not take into account the hearsay evidence Defendant has offered regarding
28 the reasons for Plaintiff’s termination from Aviation Institute of Maintenance. Absent live
testimony or the opportunity for cross examination, the Court does not find those records to be
reliable or sufficient for the Court to make a determination regarding the Plaintiff’s alleged failure
to mitigate during that time period.

1 through mitigating employment from the back pay award. The Court will also grant Plaintiff post-
2 judgment interest as specified in § 1961 and a tax gross-up in accordance with the Ninth Circuit's
3 recent decision in Clemens, to ensure he is fully made whole. Clemens, 874 F.3d at 1116.

4 **C. Front Pay**

5 *i. Legal Standard*

6 “[F]ront pay is an award of future lost earnings to make a victim of discrimination whole.”
7 Cassino v. Reichhold Chem., 817 F.2d 1338, 1346 (9th Cir. 1987). Front pay, like back pay, is an
8 equitable remedy that the Court may award if it finds that reinstating the employee with his or her
9 previous employer is inappropriate, “such as where no position is available, or the employer-
10 employee relationship has been so damaged by animosity that reinstatement is impracticable.”
11 Traxler v. Multnomah County, 596 F.3d 1007 (9th Cir. 2010). Front pay awards must also be
12 reduced by the amount the plaintiff could earn using reasonable mitigation efforts. Cassino, 817
13 F.2d at 1347.

14 *ii. Discussion*

15 As stated above, the Court finds that reinstatement is an inappropriate and unfeasible
16 remedy here, due to the deterioration of the relationship between the parties. Instead, the Court
17 finds it appropriate to give Plaintiff an award of front pay. Although Plaintiff has mitigated his
18 losses by obtaining comparable employment at FedEx, the Court finds that for the next several
19 years, Plaintiff's estimated wages and benefits will be less than what he would have earned had he
20 not been terminated from Delta. The Court finds that by the year 2025, Plaintiff's wages and
21 benefits at FedEx will exceed what he would have earned at Delta. Therefore, the Court will award
22 Plaintiff his lost earnings up until that time. The Court does not find it unduly speculative to assume
23 that Plaintiff would likely have remained employed at Delta for the next seven years, in the absence
24 of his wrongful termination. The Court does find Plaintiff's estimated lost future bonuses to be
25 overly speculative, however. Delta's bonus and profit-sharing policies have varied over the years,
26 based on the company's profitability and performance. Plaintiff and his expert have collected
27 reasonably reliable publicly available information relating to Delta's bonus and profit-sharing
28 policies in the time since Plaintiff's termination, such that the Court found it appropriate to include

1 an award of lost bonuses with Plaintiff's back pay. However, it is unreasonable to assume that
2 these policies will continue for the next several years. Therefore, the Court will not include an
3 award of lost future bonuses in the front pay calculation.

4 5 **D. Out-of-Pocket Costs**

6 Plaintiff seeks \$85,040 in "out-of-pocket" expenses that he personally lost as a result of his
7 termination from Delta. At trial, Plaintiff requested to have these expenses submitted to the jury
8 as pecuniary compensatory damages, but the Court ruled that Plaintiff had not submitted sufficient
9 specific evidence for the jury to adequately make a determination regarding the amount of
10 pecuniary losses sustained by Plaintiff. Plaintiff has not submitted any additional specific
11 documentary evidence of these expenses, but only references his general testimony regarding these
12 losses at trial. The Court does not find that it has a sufficient basis to grant these expenses and will
13 not award out-of-pocket pecuniary damages to Plaintiff.

14 15 **E. Attorney Fees and Costs**

16 *i. Legal Standard*

17 Courts use the Lodestar method to determine the amount of reasonable attorney fees to
18 award in a civil rights case. To determine the Lodestar, the Court multiplies the number of hours
19 reasonably expended on the case by the market rate "prevailing in the community for similar
20 services of lawyers of reasonably comparable skill and reputation." Jordan v. Multnomah County,
21 815 F.2d 1258, 1263 (9th Cir. 1987). The burden is on the fee applicant to produce evidence that
22 demonstrates that the requested hours and hourly rates are reasonable. Id. Factors the Court may
23 consider in reducing the number of hours reasonably expended include inadequate documentation,
24 overstaffing of the case, and the relative novelty and complexity of the issues raised. Cunningham
25 v. County of Los Angeles, 879 F.2d 481, 484-85 (9th Cir. 1989) (citations omitted).

26 Once the Lodestar figure has been calculated, the Court then determines whether it is
27 necessary to adjust this amount upwards or downwards based on the Kerr factors:

28 (1) the time and labor required, (2) the novelty and difficulty of the questions
involved, (3) the skill requisite to perform the legal service properly, (4) the

1 preclusion of other employment by the attorney due to acceptance of the case, (5)
2 the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations
3 imposed by the client or the circumstances, (8) the amount involved and the results
4 obtained, (9) the experience, reputation, and ability of the attorneys, (10) the
“undesirability” of the case, (11) the nature and length of the professional
relationship with the client, and (12) awards in similar cases.

5 Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 48
6 L. Ed. 2d 195, 96 S. Ct. 1726 (1976). As the first five Kerr factors are subsumed by the Lodestar
7 calculation, the later factors are the primary focus at this stage. Morales v. City of San Rafael, 96
8 F. 3d 359, 364, n.9 (9th Cir. 1996).

9 *ii. Discussion*

10 Plaintiff’s counsel request \$802,003.00 in attorney fees for Stone & Woodrow and \$12,600
11 for local counsel, Mr. Segerblom. This total is based on Stone & Woodrow’s reported 2,338 hours
12 spent on this case and requested rates of \$485/hour for Mr. Stone and \$300/hour for Mr. Woodrow,
13 and Mr. Segerblom’s reported 36 hours spent on this case at \$350/hour. Plaintiff’s counsel have
14 submitted declarations and itemized invoices of fees and costs. ECF No. 184, Exs. F and G. Stone
15 & Woodrow also request \$ 11,117.40 in costs under Fed. R. Civ. P. 54(d). Having reviewed
16 counsel’s declaration, the Court finds it appropriate to reduce the hourly billing rate slightly for
17 both Mr. Stone and Mr. Woodrow. Counsel did not provide significant evidence of the prevailing
18 rate in the community for similar legal work, other than their own estimations of what seems
19 reasonable and, in the case of Mr. Stone, the amount charged by opposing counsel, Mr. Mahoney.
20 Therefore, based on similar cases in this district, the Court finds that a more reasonable rate for an
21 experienced partner such as Mr. Stone is \$450/hour, and a more reasonable rate for a newer
22 associate such as Mr. Woodrow is \$250/hour. See, e.g., Wysocki v. Dourian, 2017 U.S. Dist.
23 LEXIS 174004, at *9 (D. Nev. Oct. 20, 2017); see also Sinanyan v. Luxury Suites Int’l, LLC, 2016
24 U.S. Dist. LEXIS 109890, at *12 & n.4 (D. Nev. Aug. 17, 2016) (collecting cases). Having
25 reviewed the proposed hours, the Court will defer to counsel on the time necessary to successfully
26 litigate this case. The Court is not convinced by Defendant’s arguments that Plaintiff’s counsel
27 overstaffed or spent excessive time researching and drafting motions. Counsel litigated this case
28 for years and were able to survive dispositive motions and eventually achieve success on most

1 claims at trial, overcoming complicating factors such as Plaintiff's various negative employment
2 evaluations to prove but-for causation to the jury. Multiplying the adjusted hourly rates by
3 counsel's reported hours, the updated Lodestar figure for Mr. Woodrow and Mr. Stone is \$686,960.

4 Turning to the Kerr factors, the Court does not find a basis to decrease or increase the
5 Lodestar figure in this case. As previously stated, counsel achieved success on most claims and
6 the Lodestar figure is less than Plaintiff's total damages. Although the legal issues presented were
7 not particularly novel or difficult, counsel did have to contend with certain negative facts for their
8 client, such as his inconsistent employment history and testimony from coworkers and supervisors
9 regarding his lack of professionalism. Overcoming these facts to prove pretext and but-for
10 causation took time and effort on behalf of counsel. Considering these factors, the Court will grant
11 Plaintiff's counsel the full Lodestar amount. This amount should be sufficient to compensate
12 Plaintiff's counsel for their time and encourage them to undertake similar legal work in the future.
13 The Court also finds the requested amounts for local counsel, experts, other legal assistance, and
14 statutory costs to be reasonable.

15 16 **V. CONCLUSION**

17 Accordingly,

18 **IT IS ORDERED** that Plaintiff's Motion for Motion for Damages and Recovery (ECF
19 No. 184) is GRANTED in part and DENIED in part as follows:

- 20 • The jury verdict is capped at \$300,000 in compensatory and punitive damages.
- 21 • Plaintiff is awarded \$441,396 in back pay.
- 22 • Plaintiff is awarded \$50,607 in front pay.
- 23 • Plaintiff is awarded \$68,212 in interest on back pay and a tax gross-up of \$34,495.
- 24 • Attorney fees are granted in the amount of \$686,960 for Stone & Woodrow and \$12,600 for
25 Segerblom. The Court also grants \$11,117.40 for statutory costs, \$7,875 for Carroll, and
26 \$12,000 for Sloan.

27 **IT IS FURTHER ORDERED** that Defendant's Motion to Allow Consideration of
28 Aviation Institute Maintenance Records in Post-Trial Briefing (ECF No. 174) is DENIED.

1 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment for the Plaintiff
2 and close this case.

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5 DATED: September 19, 2018.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE